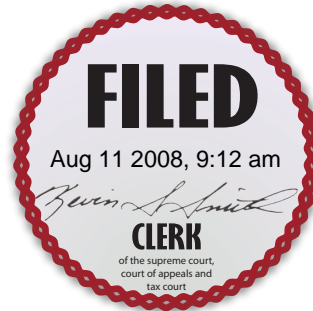


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DENNIS PETERSON,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 52A05-0803-CV-147
)	
MIAMI CORRECTIONAL FACILITY, <i>et al.</i> ,)	
)	
Appellees-Defendants.)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Robert A. Spahr, Judge
Cause No. 52C01-0706-CT-347

August 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Dennis Peterson (“Peterson”) appeals from the trial court’s order granting his motion for default judgment against Miami Correctional Facility, *et al.* (collectively “the State”), raising the following restated issue: whether the trial judge erred by failing to award Peterson monetary and punitive damages in addition to his award of costs, and the return, if it could be found, of Peterson’s personal property. The State cross-appeals presenting the following issue for our review: whether the trial court erred by ordering the State to pay \$9.40 in costs.

We affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On July 5, 2006, while Peterson was incarcerated at the Miami Correctional Facility, a Department of Correction officer confiscated forty-two photographs from Peterson. Peterson alleges that he completed the grievance process in an effort to have the photographs returned. On June 25, 2007, after failing to receive a favorable outcome from the grievance process, Peterson filed a verified complaint under the Indiana Tort Claims Act in the Miami Circuit Court alleging that the confiscation of his photographs violated his due process rights under the Fourteenth Amendment to the United States Constitution and amounted to cruel and unusual punishment under the Eighth Amendment to the United States Constitution and Article I of the Indiana Constitution.

Peterson filed a motion for default judgment against the State. The trial court granted the motion and entered a default judgment in favor of Peterson, ordering the return of the confiscated photographs, if they could be found, and the assessment of costs against the State in the amount of \$9.40. The trial court specifically found that Peterson had failed to

substantiate actual monetary damages arising from the confiscation of the photographs and denied that request. In his prayer for relief, Peterson had requested an award of \$100,000.00 in actual monetary damages and \$100,000.00 in punitive damages from each defendant, the Miami Correctional Facility and the Department of Correction officer.

Thereafter, Peterson filed a “Motion for Relief and Order to Alter the Judgment.” Ultimately, the trial court entered an amended order granting the default judgment, clarifying a reference to the photographs, specifically denying Peterson’s request for compensation for paper, copying, and postage, and denying all other matters raised by Peterson, but not specifically addressed in the order. The State previously had filed a motion to set aside the default judgment challenging the adequacy of service. Peterson then filed several motions with the trial court before ultimately filing his notice of appeal. The trial court held a telephonic conference with the parties, at the conclusion of which the trial court decided to continue the matter generally, while the State further investigated the issue of the sufficiency of service, and to take all of Peterson’s pending motions under advisement. No final rulings were issued as the trial court lost jurisdiction of the matter upon the filing of the clerk’s notice of completion of the clerk’s record. Both parties raise issues for our review on appeal.

DISCUSSION AND DECISION

I. Damages

Peterson claims that the trial court erred by failing to award him actual monetary damages of \$100,000.00 per defendant and punitive damages of \$100,000.00 per defendant. When we are asked to review a trial court’s award of damages, we employ a limited standard of review. *Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628, 656 (Ind. Ct. App. 2008).

No degree of mathematical certainty is required in awarding damages, as long as that amount is supported by evidence in the record. *Id.* We do not reweigh the evidence or reassess the credibility of the witnesses, but consider only the evidence favorable to the award. *Id.* We will not reverse an award of damages unless it is not within the scope of the evidence before the finder of fact. *Id.*

Peterson argues that Indiana Trial Rule 54(C) required the trial court to award him the damages requested in his complaint, along with his costs for paper, copying, and postage. T.R. 54(C) provides as follows:

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Where there is a default judgment, the plaintiff must provide proof as to the amount of damages by a preponderance of the evidence. *Prime Mortgage*, 885 N.E.2d at 656. Our Supreme Court has reversed a trial court's award of damages following a default judgment where no evidence was presented as to the amount. *See McKinney v. State*, 101 Ind. 355, 1885 WL 4267 at *2 (1885). Default judgments for money where there is any uncertainty as to the amount must ordinarily be supported by actual proof. *In re Marriage of Henderson*, 453 N.E.2d 310, 316 n.5 (Ind. Ct. App. 1983).

Below, Peterson bore the burden of proof as to the amount of damages. Therefore, he appeals from a negative judgment and will prevail only if he establishes that the judgment is contrary to law. *See Clark v. Crowe*, 778 N.E.2d 835, 839 (Ind. Ct. App. 2002). A judgment is contrary to law when the evidence is without conflict and all reasonable inferences to be

drawn from the evidence lead to only one conclusion, but the trial court reached a different conclusion. *Id.*

Here, there was no evidence before the trial court substantiating the actual damages requested by Peterson. Peterson mistakenly construes T.R. 54(C) to require the trial court, when granting a default judgment in Peterson's favor, to award Peterson the damages requested without evidence to support those damages. His request alone does not establish Peterson's entitlement to the award, because the amount awarded must be supported by evidence in the record. *See Gasway v. Lalen*, 526 N.E.2d 1199, 1203 (Ind. Ct. App. 1988). Therefore, the trial court did not err by refusing to award actual damages to Peterson.

Furthermore, Peterson pursued this matter under the Indiana Tort Claims Act, which provides that a governmental entity or an employee of a governmental entity acting within the scope of employment is not liable for punitive damages. *See IC 34-13-3-4(b)*. Peterson sued the State based upon the act of a Department of Correction officer done in the scope of his employment. Consequently, the trial court did not err by failing to award punitive damages in favor of Peterson.

Additionally, Peterson's challenge to the trial court's decision to not award him costs for paper, photocopying, and postage must fail. In Indiana, "costs" is a term of art with specific legal meaning. *Wiley v. McShane*, 875 N.E.2d 273, 276 (Ind. Ct. App. 2007). In the absence of manifest contrary legislative intent, the term "costs" must be given its accepted meaning, which does not include litigation expenses. *Id.* As a result, even if the assessment of costs against the State were not prohibited, the trial court could not award Peterson costs for paper, photocopying, and postage.

II. Costs against the State

The State cross-appeals arguing that the trial court erred by awarding costs in favor of Peterson in the amount of \$9.40. Initially, on June 25, 2007, Peterson was directed by the trial court to pay \$9.40 as state and county court costs. However, when Peterson prevailed on his motion for default judgment, the trial court awarded those costs to Peterson.

T.R. 54(D) provides as follows:

Except when express provision therefore is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs in accordance with any provision of law; but costs against any governmental organization, its officers, and agencies shall be imposed only to the extent permitted by law. . . .

It is well settled that the State and its agencies are not liable for ordinary court costs as a matter of public policy. *State v. Mileff*, 520 N.E.2d 123, 128-29 (Ind. Ct. App. 1988). It is error for a trial court to assess court costs against the State or its agencies as part of a judgment. *Id.* at 129. Accordingly, the trial court erred by assessing costs of \$9.40 against the State, in this case, the Miami Correctional Facility. *See* IC 11-8-2-1.

Affirmed in part, reversed in part, and remanded.

FRIEDLANDER, J., and BAILEY, J., concur.